

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 06-0790 C

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

NEW VENTURES ASSOCIATES, LLC,

Defendant.

**MEMORANDUM IN SUPPORT OF
COMMONWEALTH'S MOTION FOR
ORDER GRANTING SITE ACCESS
TO CONDUCT IMMEDIATE
RESPONSE ACTIONS**

This case involves an unlined, inactive landfill in Newburyport that is in the process of closure. This Court entered a preliminary injunction in this action on October 20, 2006, which the Court amended by orders on November 1, 2006 and February 21, 2007. The Commonwealth and defendant New Ventures Associates, LLC ("New Ventures") negotiated and agreed to the terms of the preliminary injunction, which, among other things, set conditions and deadlines for the phased capping of the landfill, and required New Ventures to implement and maintain numerous measures to prevent the release of noxious hydrogen sulfide gases from the landfill during the closure process.

Since the preliminary injunction entered in October 2006, New Ventures has repeatedly failed to comply with numerous requirements and conditions of the Court's order. *See* attached Affidavit of John Carrigan, Chief of the Solid Waste Division of the Massachusetts Department of Environmental Protection's (the "Department") Northeast Regional Office. ("Carrigan Aff."), ¶¶ 39, 60, 64, 69, 72. As required by the preliminary injunction, these violations resulted in the shut down of landfill closure work on four separate occasions since January 2007. *Id.*, ¶¶ 15, 58, 62, 64. New Ventures' repeated

violation of the preliminary injunction has thus delayed the phased capping of the landfill, which must be completed by August 30, 2007 under the Court's order – a looming deadline the landfill can not now make. Among the compliance issues that have halted closure is New Ventures' refusal to perform necessary soil testing to demonstrate the stability and integrity of the landfill's perimeter berm. Final grading and capping work can not recommence until the berm's stability has been demonstrated and any required corrective berm design measures approved by the Department. *Id.*, ¶¶ 34-37.

Most recently, New Ventures has failed and refused to take corrective actions ordered by the Department to prevent or stop the release of extremely malodorous hydrogen sulfide gas from the landfill. *Id.*, ¶ 15, 32, 39, 55. These releases are creating public nuisance conditions, and threatening the health, safety, and welfare of residents living in neighborhoods surrounding the landfill. *Id.*, ¶¶ 17, 19; Affidavit of Michael S. Hutcheson, Head of the Air and Water Toxics Section in the Department's Office of Research and Standards ("Hutcheson Aff."), ¶ 7.

The Commonwealth seeks an order allowing it access to the landfill site for the purpose of taking response actions under G.L. c. 21E that are immediately required to protect the public health, safety, and welfare. As set forth in the attached proposed order, these remedial actions include placing a temporary cap over part of the landfill releasing high concentrations of hydrogen sulfide gas, installing three new landfill gas collection wells, and sampling and analyzing soils to determine the stability of the landfill's perimeter berm. Unless the Court grants the requested relief, serious odor problems will continue to plague the residents living near the landfill. All of the requested relief is in the public interest because it will control or eliminate a public nuisance and threat to the public health, safety and welfare.

BACKGROUND AND FACTS IN SUPPORT OF REQUESTED RELIEF

New Ventures owns and operates the Crow Lane Landfill (the “Landfill”) located on Crow Lane in Newburyport, Massachusetts (the “Site”). Carrigan Aff., ¶ 5.

New Ventures receives processed construction and demolition waste fines and residual material (“C&D Material”) from a solid waste processing facility for use in the landfill closure process. *Id.*, ¶ 8. New Ventures uses revenues derived from the receipt of the C&D Material to finance the closure of the Landfill. *Id.*, ¶ 9.

Landfills in Massachusetts, including Crow Lane, that use C&D Material for grading and shaping material generate malodorous hydrogen sulfide gas. *Id.*, ¶ 10. Wallboard in C&D Material contains gypsum that, when exposed to moist, aneorbic conditions in a landfill containing organic material, breaks down and releases hydrogen sulfide gas. *Id.*, ¶ 11. The Department requires Massachusetts landfills that have accepted and placed C&D Material to implement various measures to control the release of noxious hydrogen sulfide and other landfill gases. *Id.*, ¶ 14. When fully implemented and properly maintained, these measures have successfully controlled the release of hydrogen sulfide and other gasses at Massachusetts landfills other than Crow Lane. *Id.*

The Commonwealth’s Complaint and the Preliminary Injunction

The Commonwealth commenced the underlying action on February 23, 2006. Among other things, the Complaint alleged that New Ventures had violated its Solid Waste Permit, Department enforcement orders, and the Commonwealth’s solid waste and air pollution control laws and regulations. The Complaint sought preliminary injunctive relief requiring various corrective actions, including measures to control the release of malodorous hydrogen sulfide gas from the landfill.

This Court (Spurlock, J.) entered a preliminary injunction in this action on October

20, 2006, which the Court amended by orders on November 1, 2006 (Spurlock, J.), and February 21, 2007 (Sanders, J.). The injunction, as amended (the “Preliminary Injunction”) required, among other things: a) installation of a landfill gas extraction system combined with two levels of air pollution control equipment (a system of filters to “pretreat” collected landfill gasses to remove sulfide compounds, and an enclosed flare to burn off any remaining hydrogen sulfide not captured by pretreatment), b) the phased capping of the Landfill under certain conditions and by set deadlines; and c) the implementation and maintenance of numerous measures to prevent or mitigate the release of noxious hydrogen sulfide gas from the Landfill during the closure process. A true and complete copy of the Preliminary Injunction is attached as “Exhibit 1.”

New Ventures’ Repeated and Ongoing Violations of the Preliminary Injunction and Resulting Shut Downs

Beginning just days after the Preliminary Injunction entered on October 20, 2006, and continuing until the date of this memorandum, New Ventures has repeatedly violated multiple requirements of the Preliminary Injunction by, among other things, failing to install or missing deadlines to install required equipment and failing to implement or fully implement required measures, including those aimed at preventing the release of hydrogen sulfide gas during the closure process. Carrigan Aff., ¶¶ 38-18; Affidavit of Shaw Environmental, Inc. (“Shaw”) employee Eric M. Hart (“Hart Aff.”), ¶¶ 8-38. The Department contracted with Shaw to inspect the landfill and monitor work required by the Preliminary Injunction. Carrigan Aff., ¶ 13; Hart Aff., ¶ 5. From March 5, 2007 through June 25, 2007, Shaw has conducted these monitoring inspections three days per week, and from June 26, 2007 through the present for two days a week, for approximately six hours per day. *Id.* Hart Aff., ¶ 7.

New Ventures is currently out of compliance with several requirements of the

Preliminary Injunction. Carrigan Aff, ¶ . *See also* Appendix A to the Carrigan Aff., including the Department's correspondence to New Ventures dated July 4, 2007 and July 25, 2007. Because of New Ventures' repeated violations and ongoing noncompliance, the Department on four separate occasions halted all use of C&D Material for shaping and grading work to prepare the landfill for capping: 1) from January 3, 2007 through January 23, 2007; 2) from January 26, 2007 through from February 21, 2007; 3) from April 13, 2007, through Jun 8, 2007; and 4) from July 4, 2007 through the present. *Id.*, ¶¶ 15, 58-64. *See also* Appendices A and D to the Carrigan Aff., including Correspondence from the Department to New Ventures dated January 3, 2007, January 26, April 12, 2007, July 4, 2007, and July 25, 2007. These Landfill closure work shut downs were required by paragraph nine (9) of the Preliminary Injunction. *Id.* New Ventures' noncompliance has time and time again delayed closure work at the Landfill. *Id.*, ¶ 17. The Preliminary Injunction requires completion of the final Landfill cap by August 20, 2007. New Ventures can not and will not now meet that deadline. *Id.*

CURRENT HYDROGEN SULFIDE RELEASES, NUISANCE ODORS, AND IMMEDIATE THREATS TO THE PUBLIC HEALTH, SAFETY AND WELFARE

Odor Complaints and Health Effects Experienced by Newburyport Residents

From May 1, 2007 through July 25, 2007, the Department, the City of Newburyport, and/or New Ventures received at least 148 separate complaints from 18 different Newburyport resident households about noxious "rotten egg" odors emanating from the Landfill. Carrigan Aff., ¶ 38. Of those 148 complaints, one third reported physical symptoms, such as eye and throat irritation, difficulty breathing, and headaches, while five percent reported nausea. *Id.*

In addition to these 148 odor complaints, six Newburyport residents living in the vicinity of the Landfill have testified in sworn affidavits that noxious odors emanating from

the Landfill have repeatedly caused them to suffer adverse health effects, including eye irritation, sinus problems and runny noses, sore throats, headaches, lightheadedness, dizziness, shortness of breath, “burning in the chest,” “a general feeling of exhaustion,” nausea and vomiting. *See* Affidavits of Newburyport Residents Terry J Berns, Eric J. Carpenter, David Chatfield, Ronald Klodenski, Brenda Reffett, and William A. Woodbury (“Resident Affs. I-VI,” respectively).¹ These residents have complained of “foul and highly obnoxious odors resembling that of rotten eggs,” “horrendous odors resembling rotten eggs,” and “strong odors” ranging “from a rotten egg-like smell to raw sewage odor.” Resident Affs. IV-VI. The odors have prevented the residents from spending time outdoors in their yards or on decks and patios, and have interfered with or prevented indoor and outdoor dining, entertaining, and recreation activities. Resident Affs. I-VI. Not only are these smells experienced outside their homes, but the odors also infiltrate inside, with rotten egg smells permeating bedrooms, kitchens, basements, and garages. Resident Affs. I, III-VI. The odors have repeatedly interrupted and disturbed some residents’ sleep. Resident Affs. III-VI. Several residents are concerned about the long-term health effects of exposure to the odors. Resident Affs. II-IV, VI. All report adverse impact on their quality of life, physical and psychological well being, and ability to enjoy the normal use of their homes and property. Resident Affs. I-VI.

Hydrogen Sulfide Concentration Ambient Air Monitoring Data

The residents’ odor complaints are supported by data recording hydrogen sulfide

¹ These affidavits, sworn between July 5 and July 9, 2007, were originally filed in *City of Newburyport by and Through its Board of Health v. New Ventures Associates, LLC*, Essex Superior Court, C.A. No. ESCV2007-01255. In this action, brought on or about July 10, 2007, the City of Newburyport’s Board of Health sought temporary injunctive measures to abate a public nuisance and mitigate noxious hydrogen sulfide odors emanating from the Crow Lane landfill. The temporary injunctive relief sought by the City of Newburyport in the Essex action does not conflict with the Commonwealth’s Preliminary Injunction or relief sought in this motion.

concentrations in the ambient air from an air monitoring station located in one of the neighborhoods near the landfill at 6 Charmanski, Drive in Newburyport (the “Charmanski Station”). Carrigan Aff., ¶ 38. New Ventures established the Charmanski Station on or about January 4, 2005. *Id.*, ¶ 42. From June 15, 2007 through June 20, 2007, Newburyport residents’ complaints of physical symptoms associated odors corresponded, over the same time periods, to hydrogen sulfide concentrations in the ambient ranging from 3 to 35 ppb, as detected by the Charmanski Station. *Id.*, ¶ 45.

In addition, Shaw inspectors monitored the concentration of hydrogen sulfide in the ambient air at twenty one (21) different locations in the neighborhoods surrounding the landfill on at least 43 nights between June 12, 2007 and July 25, 2007. Carrigan Aff., ¶¶ 38; Affidavits of Shaw employees Caitlin Lawrence, James LaFond, Dan Leahy, Peter Lielausis, Bennett H. Short, and Wayne Holt (the “Neighborhood Monitoring Affs. I-V.”). During these overnight air monitoring inspections, hydrogen sulfide readings were recorded in the neighborhoods around the Landfill in concentrations ranging from 4 to 134 ppb. *Id.*

Hydrogen Sulfide Gas Releases From the Landfill

Shaw also monitored releases of hydrogen sulfide gas from the landfill by measuring hydrogen sulfide concentrations at eight (8) monitoring locations around the immediate perimeter of the Landfill. Neighborhood Monitoring Affs. I-V. These Landfill perimeter monitoring locations are indicated on the map attached as Exhibit B to the Neighborhood Monitoring Affs. I-V. Shaw’s inspectors monitored the hydrogen sulfide releases around the landfill perimeter on 40 days between June 12, 2007 and July 25, 2007. *Id.* The concentrations of hydrogen sulfide gas coming off the landfill ranging from 5 to 470 ppb. *Id.*

Hydrogen Sulfide From the Landfill Is Migrating to Neighborhoods Around the Landfill, Creating Nuisance Conditions and Threatening the Public Health, Safety, and Welfare

Hydrogen sulfide is a gas with a noxious, pungent, rotten egg odor that most people detect at extremely low levels. Hutcheson Aff., ¶ 6. As concentrations increase, a spectrum of responses occurs in exposed people starting with mild irritant responses and progressing to more severe physical symptoms. *Id.* Hydrogen sulfide's odor is perceived immediately upon inhalation of a breath of air. *Id.* Some people then experience headaches, nausea, and irritation of eyes and nose. *Id.*

The ability to detect the odor of hydrogen sulfide and other odorants varies, but most people detect hydrogen sulfide odors beginning at concentrations between 5-7 ppb. *Id.* An individual's perception of an odor as harmful to one's health increases the severity of physical symptoms experienced, such as headache, nausea, eye and throat irritation. *Id.*

Recognizing the nuisance and public health threat posed by hydrogen sulfide, four states have promulgated one-hour ambient air quality standards for hydrogen sulfide gas exposure. *Id.* See also Section 5.0 of the July 25, 2007 Report of Michael Hutcheson entitled "Relationship Between Odor Nuisance and Perception of Health Effects" attached as Exhibit 1 to the Hutcheson Aff. New York, New Mexico, and Kentucky have promulgated one-hour ambient air quality standards for hydrogen sulfide exposure, which shall not exceed 10 ppb over a one-hour average more than once per year. *Id.* California set a one-hour ambient air quality standard for hydrogen sulfide exposure, which shall not meet or exceed 30 ppb over a one-hour average, although California has acknowledged that this standard may need to be reexamined in light of testimony presented by the California Air Resources Board that some people report headaches and other symptoms with exposure to hydrogen sulfide under 30 ppb. *Id.* The World Health Organization recommend that hydrogen sulfide concentrations in

the ambient air not exceed 5 ppb over a 30-minute averaging period, recognizing that exposure to hydrogen sulfide odors at concentrations this low can affect quality of life. *Id.*

As Head of the Air and Water Toxics Section of the Department's Office of Research and Standards, Hutcheson is responsible for, among other duties, producing reviews of toxicity data, developing new human health and ecological risk assessment methodologies, and evaluating environmental sampling data and assessing both human and ecological risks as a result of exposures to chemicals in the environment and home. *Id.*, ¶ 3. Based on his review of recent hydrogen sulfide concentration monitoring data from the neighborhoods around the Landfill, resident odor complaints, and his more thorough analysis of hydrogen sulfide information from the Landfill in the summer of 2006, Hutcheson's professional opinion is that the data:

strongly support our [the Department's Office of Research and Standards] contention that the past and continuing exposures experienced by residents in the community surrounding the Crow Lane Landfill have been persistent and noxious. Pursuant to 310 CMR 40.0994, these conditions represent a significant nuisance condition detrimentally affecting the public welfare in the community.

Id., ¶ 7.

New Ventures Failure to Take Required Corrective Actions to Control the Release of Hydrogen Sulfide and Protect the Public Health, Safety and Welfare

New Ventures' repeated violations of the Preliminary Injunction and failure or refusal to take the actions ordered by the Department to prevent or stop the release of hydrogen sulfide gas have created an ongoing public nuisance and threatens the public health, safety, and welfare in the residential neighborhoods around the Landfill. Hutcheson Aff, ¶ 7; Neighborhood Monitoring Affs I-V; Newburyport Resident Affs I-VI; Carrigan Aff, ¶¶ 17, 19.

In letters to New Ventures dated June 20, 2007, June 21, 2007, July 2, 2007, July 4, 2007, and July 25, 2007, the Department notified New Ventures that it must take the following corrective actions to control the release of hydrogen sulfide and other gases at the Landfill:

1. install a “temporary cap” on the Phase IA Area of the Landfill by: a) removing the tarps currently covering that area, b) placing at least one foot of low permeability soil that, at a minimum, meets the standard for intermediate cover pursuant to section 310 CMR 19.130(15)(d)3.a., and c) replacing the tarps to cover the newly placed low permeability soil temporary cap;
2. install landfill gas extraction wells EW-7, EW-10 and EW-13 and complete the landfill gas system header (piping), as authorized by the MassDEP’s June 27, 2007 email to New Ventures Attorney, Mr. Richard A. Nylen, Jr. (A true and accurate copy of the June 27, 2007 email is attached in Appendix D to the Carrigan Aff);
3. adjust, modify, and operate the landfill gas system in order to maximize the radius of influence of the landfill gas extraction wells and to optimize the operation of the landfill gas system in order to control the emission of the landfill gas and hydrogen sulfide; and,
4. demonstrate the stability and integrity of the Landfill perimeter berm.

See Carrigan Aff., ¶¶ 46, including the attached Appendices A and B. As of the date of this memorandum, New Ventures has failed or refused to take any of the above corrective actions that are immediately required to protect the public health, safety and welfare. *Id.*, ¶ 32.

ARGUMENT

I. Legal Standard For the Commonwealth’s Motion for Preliminary Relief

The legal standard applicable to a request by the Attorney General for preliminary relief to enforce a statute or a regulatory scheme to protect the public interest is well established. *See Commonwealth v. Mass. CRINC*, 392 Mass. 79, 87-90 (1984). A court reviewing such a request for preliminary relief is required to determine whether “the requested relief promotes the public interest, or, alternatively, [whether] the equitable relief

will not adversely affect the public.” *Id.* at 89 (citations omitted). The court must also consider whether there is a likelihood of statutory violations and how such statutory violations affect the public interest. *Id.* The Commonwealth need not, however, demonstrate a likelihood of success on the merits at trial, as required in a case between private parties. *Id.* at 89-90. Nor must the Commonwealth show that without the preliminary relief requested, the public interest will suffer immediate and irreparable harm incapable of remediation by a final judgment ordering permanent injunctive relief or remedies at law. *Id.*

Thus, in reviewing the Commonwealth’s request for preliminary relief, the Court need only consider and determine whether the defendant has likely violated the Commonwealth’s environmental laws and regulations *Id.* Not only has the Commonwealth met this standard, but New Ventures’ repeated violation of the Preliminary Injunction and continuing failure to take the immediately required steps to control the release of hydrogen sulfide gas at the Landfill make this a compelling case for further preliminary injunctive relief, including granting the Department access to the site to undertake response actions under G.L. c. 21E to protect the public health, safety and welfare. In the alternative, this Court should order that New Ventures immediately implement those same measures.

II. Legal Standard and Basis for the Department’s Issuance of a Notice of Response Action (NORA) under G.L. c. 21E

The Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E (the “Act”), “was drafted in a comprehensive fashion to compel the prompt and efficient cleanup of hazardous material and to ensure that costs and damages are borne by the appropriate responsible parties.” *Taygeta Corp. v. Varian Associates, Inc.*, 436 Mass. 217, 219-20 (2002). The primary purpose of G.L. c. 21E is “to improve the

Commonwealth's capability to respond to environmental contamination and to recover response costs from persons responsible for the contamination. *Id.*, quoting *Guaranty-First Trust Co. v. Textron, Inc.*, 416 Mass. 332, 335, (1993). To that end, and pursuant to G.L. c. 21E, §3, the Department has promulgated extensive regulations at 310 C.M.R. 40.0000, known collectively as the Massachusetts Contingency Plan ("MCP"), for purposes of implementing, administering and enforcing G.L. c. 21E.

Under Section 4 of the Act, the Department "is authorized to take or arrange for such response actions as it reasonably deems necessary" under the MCP "whenever it has reason to believe that oil or hazardous material has been released or that there is a threat of release of oil or hazardous material." The Act defines a "hazardous material" as "...any material, in whatever form, which, because of its quantity, concentration, chemical, . . . [or] toxic . . . characteristics, either separately or in combination with any substance or substances, constitutes a present or potential threat to human health, safety, welfare, or to the environment." *See* G.L. c. 21E, §2 and 310 C.M.R. 40.0006. Hydrogen sulfide gas is a listed hazardous material under the MCP. *See* 310 C.M.R. 40.1600. The Act defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment," and a "threat of release" as "a substantial likelihood of a release which requires action to prevent or mitigate damage to the environment which may result from such release." The Landfill is a "Site" under the Act, the definition of which includes "any ...landfill ... where oil or hazardous material has been deposited, stored, disposed of or placed, or otherwise come to be located." *See* G.L. c. 21E, §2 and 310 C.M.R. 40.0006.

Hydrogen sulfide gas is a listed hazardous material under the MCP. *See* 310 C.M.R.

40.1600.² Under the MCP, response actions are required for releases or threats of release that pose a significant risk to public health, safety, welfare, or the environment, as described in 310 CMR 40.0900.

The Department has determined that the hydrogen sulfide releases from the landfill pose a threat to public health, safety and welfare. *See* 310 C.M.R. 40.0370(1) and Hutcheson Aff., ¶ 7; Neighborhood Monitoring Affs I-VI; Newburyport Resident Affs I-VI. Based on its analysis of landfill gas monitoring data, the Department has identified and evaluated nuisance conditions in the neighborhoods surrounding the Landfill resulting from the releases of hydrogen sulfide gas at or from the Landfill. Hutcheson Aff, ¶ 7. According to the Department's expert, "the past and continuing exposures experienced by residents in the community surrounding the Crow Lane Landfill have been persistent and noxious. Pursuant to 310 C.M.R. 40.0994, these conditions represent a significant nuisance condition detrimentally affecting the public welfare in the community." Hutcheson Aff., ¶ 7.

In addition, the releases of hydrogen sulfide from the landfill could pose an Imminent Hazard pursuant to 310 C.M.R. 40.0332(1)(f), because hydrogen sulfide releases have periodically resulted in neighborhood residents experiencing moderate to severe health effects such as dizziness, lightheadedness, shortness of breath, nausea and vomiting. Hutcheson Aff., ¶ 7; Neighborhood Monitoring Affs I-VI; Newburyport Resident Affs I-VI.

Accordingly, and as set forth in the NORA, the Department has appropriately determined that response actions must proceed without delay to stop or control the releases

² Hydrogen sulfide gas is a listed hazardous material under the MCP with a reportable quantity of 10 pounds. *See* 310 C.M.R. 40.1600. The Department must be notified of a release or threat of release that exceeds a reportable quantity. *See* 310 CMR 40.0300. While releases above this reportable quantity may occur at the landfill, the MCP requires response actions for releases or threats of releases that pose a significant risk to health, safety, public welfare, even if the release does not trip the reportable quantity level requiring notification. *See* 310 CMR 40.0370(1).

of hydrogen sulfide gases from the landfill to protect public health, safety, and welfare. *See* 310 C.M.R, 40.0994(2).

The Landfill is Not an “Adequately Regulated Site”

Although closure of the Site is subject to numerous Department orders and approvals issued pursuant to the Solid Waste Management Act, G.L. c.111, §150A, and the solid waste management regulations at 310 C.M.R. 19.00, the MCP does not preclude the Department from exercising its broad authority to take or arrange for response actions at the Site if, as is the case here, the Site is not in compliance with those orders and approvals.

The stated purpose of the MCP provisions relating to “Adequately Regulated Sites” is to “establish requirements and procedures in accordance with M.G.L. c. 21E, §3(c) for limiting the applicability of M.G.L. c. 21E and 310 C.M.R. 40.0000 to response actions at disposal sites *deemed adequately regulated by the Department under another program....*” *See* 310 C.M.R. 40.0110(1) (emphasis added). The MCP thus bestows on the Department the authority for determining whether a disposal site is adequately regulated.

In this case, precisely because New Ventures has repeatedly violated and is currently not in compliance with the Preliminary Injunction ordered pursuant to the Department’s authority under the Solid Waste Act and regulations, the Department has determined that the Landfill is not adequately regulated under 310 C.M.R. 40.0110(1). Carrigan Aff., ¶ 56. Hence, the Department has the authority to access the Site and to take the response actions specified in the NORA under G.L. c. 21E to protect the public from the Landfill’s hydrogen sulfide releases that are threatening the public health, safety and welfare.

The Department may enter sites and other properties in order to carry out its broad authority to conduct response actions. Section 8 of the Act provides that whenever it

reasonably determines that there has been a release or threat of release of hazardous material from or at a site, the Department and its authorized representatives or contractors may enter such site and undertake “such actions pursuant to section four and the Massachusetts Contingency Plan relative to the assessment, containment and removal of...hazardous material as it reasonably deems necessary.”

On July 2, 2007, the Department issued a written Notice of Responsibility/Notice of Response Action (“NORA”) to the owner and operator of the Crow Lane Landfill, New Ventures Associates, LLC and to its President, William Thibeault. As required by Section 4 of the Act, the NORA stated the Department’s authority under G.L.c.21E, §4 and its intent to access the Landfill to undertake response actions required to stop the release of hydrogen sulfide gas, including actions the Department ordered that New Ventures take by letter dated June 20, 2007. A true and complete copy of the NORA is attached as Appendix D to the Carrigan Aff.

New Ventures responded to the NORA by letter dated July 16, 2007, arguing that the actions described in the NORA are not appropriate under G.L. c. 21E or the MCP and that the Department is attempting to use the Act to perform, or force New Ventures to perform, landfill closure activities otherwise regulated under the solid waste facility management regulations at 310 CMR 19.00 and are covered by the Preliminary Injunction. New Ventures’ arguments must be rejected.

Under the MCP, the Department has broad authority to take or arrange for such response actions as it reasonably deems necessary to respond to releases or threats of release of oil and/or hazardous material. The Department has final administrative authority and discretion to determine any and all of the following: (a) whether a release or threat of release

of oil and/or hazardous material has occurred; (b) whether a release or threat of release of oil and/or hazardous material requires a response action; and (c) the appropriate extent and nature of response actions consistent with G.L. c. 21E and the MCP. 310 C.M.R. 40.0100.

The Department has made those determinations and should be allowed access to the Site to perform the response actions required to protect the public health, safety and welfare.

III. By Causing or Allowing the Release of Hydrogen Sulfide Gas and by Failing or Refusing to Take Corrective Action to Control those Releases, New Ventures is Creating a Public Nuisance and Threatening the Public Health, Safety, and Welfare

The Commonwealth has demonstrated by sworn affidavit that New Ventures has a long history of disregarding regulatory requirements and repeatedly violating the Department's enforcement orders, which led to the Commonwealth's filing the underlying complaint in the this action alleging multiple and serious violations of the Solid Waste Act and regulations, creating of a public nuisance, and threatening the public health, safety and welfare. *See Carrigan Aff.*, ¶¶ 38-40. The Carrigan and Hart affidavits establish that New Ventures has repeatedly violated, and is currently not in compliance with the Preliminary Injunction. *Id.*

For at least the past two months, New Ventures has caused or allowed the release of noxious hydrogen sulfide from the Landfill, which gas has migrated into the surrounding neighborhoods, created a public nuisance and threatened the public health, safety and welfare. Carrigan Aff., ¶¶ 38-40; Neighborhood Monitoring Affs. I-V, Newburyport Resident Affs, I-VI. New Ventures has failed or refused to take the corrective actions necessary to control hydrogen sulfide releases. *See above and Carrigan Aff.*, ¶ 55.

IV. Because of NV's Refusal or Inability to Perform Corrective Measures, This Court Should Grant the Department Site Access To Perform Required Response Actions Under c. 21E, as Set Forth in Proposed Order

As set forth above, the Department has ordered New Ventures to take the following corrective actions to control the continuing releases of hydrogen sulfide and landfill gas: (1) place a temporary cap, consisting of at least one foot of low permeability soil, on the Phase IA area of the Landfill; (2) install three landfill gas extraction wells and piping; (3) adjust and modify operation of the landfill gas system optimize performance; and (4) take and analyze soil samples to demonstrate the stability and integrity of the perimeter berm. Carrigan Aff., ¶ 20.

The Phase IA area of the landfill is not capped and, since May 2007, and particularly since June 2007, has been one of the primary sources of hydrogen sulfide gas releases from the landfill. Carrigan Aff., ¶¶ 16, 20. The placement of a “temporary cap” consisting of low permeability soils over the Phase IA area will prevent or greatly mitigate the release of hydrogen sulfide and other gases until this section of the landfill is capped. *Id.*, ¶ 20. Likewise, installing additional extraction wells and piping, and adjusting the system to maximize gas extraction performance will dramatically reduce hydrogen sulfide gas emission from the Landfill. *Id.*

The perimeter berm is a principal structural element of the Landfill designed to contain and support the Landfill's base and side slopes. Carrigan Aff., ¶ 21. The final design of the landfill closure, including the landfill grades, cap, storm water system, and other appurtenances is contingent on the Department's approval of a final berm designed according to sound and accepted engineering practice and standards that demonstrate the berm's integrity and stability. Carrigan Aff., ¶¶ 21-24; Affidavit of Benjamin Siebecker, Lead Engineer and Project Manager, Shaw Environmental, Inc. (“Siebecker Aff.”), ¶¶ 7-10.

On March 7, 2007, the Department, pursuant to paragraph 1(p) of the Preliminary Injunction, issued a notice of deficiency regarding the revised berm design and evaluation submitted by New Ventures in February. Carrigan Aff., ¶ 25. This deficiency notice identified additional information that New Ventures must provide to demonstrate that the design met appropriate engineering safety levels sufficient to demonstrate that the berm would remain stable. *See Id.*, including the attached deficiency notice. *See also* Siebecker Aff., ¶¶ 8-10.

On June 4, 2007, the Department received a report (“June 2007 Berm Design”) from New Ventures’ in response to the Department’s March 7, 2007 deficiency notice. Carrigan Aff., ¶ 26. By letters dated July 4 and 25, 2007, the Department notified New Ventures that the June 2007 Berm Design did not provide sufficient information regarding the as-constructed conditions of the existing berm to enable the Department to validate the engineering assumptions used in New Ventures’ revised berm design. *Id.*, ¶ 28. Specifically, the June 2007 Berm Design failed, among other things, to demonstrate the stability and suitable strength and compaction of the soil in the berm’s foundation by documenting that unstable, soft organic material such as peat had been removed and that the berm was constructed as a “controlled fill” with proper compaction. Carrigan Aff., ¶ 20-27; Siebecker Aff. ¶¶ 8-10.

Accordingly, by communications and correspondence on June 13, and 15, 2007, the Department informed New Ventures that a soil sampling and testing program must be conducted to demonstrate, among other things, that unstable organic material had been removed from the foundation soils and that the berm had been properly constructed. *See* Carrigan Aff., ¶¶ 30-33, including attached correspondence. This information was necessary to validate the engineering assumptions underlying New Ventures’ June 2007

Berm Design. *Id.*

In communications with the Department on June 29, 2007 and July 2, 2007, New Ventures stated that it would not perform or allow the Department to perform any soil sampling and testing program to document the berm's stability in order for the Department to complete its review and approval of the June 2007 Berm Design. *Id.*, ¶ 32.

On July 4, 2007, pursuant to paragraph 9 of the Preliminary Injunction, the Department notified New Ventures that it could not resume placement of C&D material at the Landfill because it had failed to provide adequate information regarding the stability of the existing berm. *Id.*, ¶¶ 35-37. Continued placement of the C&D Material without an approved final design limits the ability, if necessary, to revise the berm design to obtain the appropriate factors of safety and to revise the storm water control system design. *Id.*

Until the berm's stability is demonstrated and a final berm design is approved by the Department, there exists a potential threat to public health, safety, welfare and the environment. A partial or total berm collapse would release contaminants to surrounding wetlands and result in further, serious releases of high concentrations of hydrogen sulfide gas to the ambient air. Carrigan aff., ¶ 34. The only way to permanently control hydrogen sulfide from the Landfill is to complete the cap and finalize the closure process. *Id.* The Landfill cannot be capped and closed until the berm stability issue is resolved and the Department approves final berm design. *Id.* Thus, the Court should grant the Department access to the Site to collect and analyze soil samples to demonstrate the berm's stability.

The Department, consistent with its authority and civic responsibilities under G.L. c. 21E and the MCP, issued a NORA notifying the Landfill that it intends to conduct the necessary response actions to eliminate the continuing health threat posed by the releases of landfill gas and hydrogen sulfide gas at and from the Landfill unless New Ventures commits

to performing the same response actions. New Ventures responded by refusing to conduct the required response actions and by refusing to permit the Department access to conduct those actions. Hence, this Court should grant the Commonwealth's motion for entry onto the Site for the purpose of performing the response actions set forth in the proposed Order, attached as "Exhibit 1" to the Commonwealth's Motion for Site Access to Perform Response Actions.

V. In the Alternative, the Court Should Order NV to Perform all Corrective Actions Immediately Required to Protect the Public Health, Safety, and Welfare, as Set Forth in Proposed Order

In the alternative, the Court should order New Ventures to perform the foregoing corrective actions that the Department has reasonably determined are necessary to protect the public health, safety and welfare. Such an order should be contingent, however, on (1) a showing by New Ventures that it has sufficient financial and staffing resources to conduct the response actions; (2) adherence by New Ventures to strict compliance deadlines; and (3) the right of the Department or its authorized employees, agents or contractors to oversee all response actions performed by New Ventures or its contractors.

CONCLUSION

For all the foregoing reasons, the Commonwealth respectfully requests that this Court issue an order granting the Department access to the Landfill Site for the purpose of conducting the response actions pursuant to the Departments NORA issued under the authority of G.L. c. 21E. The specific response actions immediately required to protect the public health, welfare that the Commonwealth and its contractors will conduct are set forth in the Proposed Order in the form attached as "Exhibit 1" the Commonwealth's Motion for Site Access to Conduct Response Actions.

In the Alternative, the Commonwealth requests that the Court order New Ventures to immediately conduct all corrective actions necessary to protect the public health, safety and welfare. All of the requested relief is in the public interest because it prevents or controls a threat to the public health, safety and welfare.

Respectfully submitted,
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